OPINION NO. 184 ANSWERED BY LETTER.

May 1, 1962

FILED
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Honorable Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Mr. Hoff:

This is in response to your inquiry as to whether an alderman of a city of the fourth class, having received the largest number of votes from a field of three candidates, may properly take office in spite of the fact that on the day of the election he was delinquent in the payment of taxes to the city. You also state that the back taxes were paid by him on the day after the election and prior to his taking the oath of office.

Section 79.250, RSMo 1959, provides:

> "All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city."

As you point out in your letter, the determinative issue is whether the disqualification worked by a tax delinquency attaches at the time of the casting of votes or at the time that the candidate is sworn into office.

Although we are aware of the holding in State ex rel. Thomas v. Williams, (1889) 99 Mo. 291, 12 SW 905, as to a provision in the St. Louis City Charter which was substantially similar to that under consideration in Section 79.250, we cannot say with any reasonable degree of certainty that such a position would be taken by an appellate court today.

Rather, it is entirely possible that a more liberal view would be adopted such as those appearing in the cases decided in this century on related questions. For example, in Contley v. Village of Mt. Moriah (Mo. App. 1932), 49 SW2d 275, a statute requiring the treasurer of a village to give bond before entering upon the duties of his office was held to be directory rather than mandatory. The court said therein, l.c. 276, that "'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute shall be held to be directory.'"

In State ex inf. Mitchell v. Heath (Mo. Sup. 1939), 132 SW2d 1001, our Supreme Court rejected the contention that a school director should be ousted from office because he was not a resident taxpayer who had paid tax within a year prior to his election and because he had not been sworn into office within four days after his election, both of which were statutory prerequisites to election as such officer. The court held that the requirement as to the time within which the oath was to be administered was directory rather than mandatory and gave recognition to the director's swearing in "within a reasonable time and before any effort was made to declare or fill a vacancy."

With regard to the fact that the director had not paid tax within a year prior to the election but had paid before he was sworn into office, the court held that as to property taxes and in view of the system followed in assessing and collecting them, the "reasonable construction" of the statue would be that a person "shall have paid the state and county tax which was due and payable within the calendar year next preceding his election". Significantly, the court then added, l.c. 1005:

> "We further hold that a person, who owns taxable property and owes taxes on it which are due and payable during the calendar year preceding his election, would be eligible to take the office of common school director if he pays such taxes at least prior to the time prescribed for taking his oath of office."

The rule of the Heath case evolved after a discussion of the principle recognized by the court that, l.c. 1004, "'statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers.'"

Thus, we have the situation where the strict rule of the 1889 Thomas Case seemingly has been relaxed by some subsequent cases. In last analysis, in light of the decided cases, it would appear that only the Missouri Supreme Court can tell us whether the Thomas case is still of binding effect today.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

AJS:jh